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No. 06-1616

IN THE
SUPREME COURT OF THE UNITED STATES

ELROY CHESTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

Introduction 1

Reasons for Granting the Writ 3

I. Texas's Method For Assessing Mental Retardation Results In The Execution of Mentally Retarded Defendants, In Violation of *Atkins* and the Eighth and Fourteenth Amendments 3

A. The Question Is Properly Presented For Review 3

B. *Atkins* Recognizes A National Consensus On Mental Retardation 4

C. Under *Briseño*, Texas Dissents From The National Consensus And Systematically Executes Mentally Retarded Offenders 6

Conclusion 10

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Ex Parte Bell,
152 S.W.3d 103 (Tex. Crim. App. 2004) 7

Ex Parte Briseño,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ford v. Wainwright,
477 U.S. 399 (1986) 4, 9

Lawrence v. Florida,
127 S. Ct. 1079 (2007) 4

Medellin v. Dretke,
544 U.S. 660 (2005) 3

Panetti v. Quarterman,
127 S. Ct. 2842 (2007) 8, 9

People v. Superior Court,
155 P.3d 259 (Cal. 2007) 5

Pruitt v. State,
834 N.E.2d 90 (Ind. 2005) 5

Roper v. Simmons,
543 U.S. 551 (2005) 3

Smith v. Texas,
543 U.S. 37 (2004) 3

Van Tran v. Tennessee,
2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006),
petition for cert. filed, 2007 WL 2049304
(U.S. July 16, 2004) (No. 07-62) 4

Constitutional Provisions, Codes and Rules

U.S. CONST. amend. VIII ..... *passim*

U.S. CONST. amend. XIV 3

28 U.S.C. § 1257(a) 3

28 U.S.C. § 2254(d)(1) 3

Supreme Court Rule 10 4

INTRODUCTION

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court banned the execution of the mentally retarded as excessive punishment under the Eighth Amendment. *Id.* at 321. Texas defeats the constitutional restriction by applying a test for determining mental retardation that enjoys no support within the professional community and effectively excludes most Texas defendants, who, like petitioner Elroy Chester, meet nationally accepted clinical definitions of mental retardation. This Court should grant certiorari to prevent Texas from continuing to execute mentally retarded citizens in violation of *Atkins*.

In this case, petitioner established that he properly is classified as mentally retarded under the established assessment factors adopted by the American Association on Mental Retardation (AAMR) and the DSM-IV-TR of the American Psychiatric Association (APA), relied upon in *Atkins*. Proof of retardation largely was established by undisputed evidence. The State of Texas does not dispute that Chester has "significantly subaverage intellectual functioning" and that he suffered its onset before the age of eighteen. [Respondent's Brief in Opposition ("BIO") at 7] Chester tested repeatedly throughout his life in the mentally retarded range on standardized IQ tests, including a full scale score of 59 when he was twelve years old.[1] Respondent also does not dispute much of the substantial evidence admitted at trial that established that Chester suffers significant deficits in adaptive functioning, as that term is used by the professional community. Indeed, Chester scored

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[1] As it did in the trial court, respondent continues to misstate this score as 69. [BIO at 7] The Texas Court of Criminal Appeals substituted the correct score in arriving at its finding that petitioner's IQ is below 70 and that he "met his burden in demonstrating significant limitations in intellectual functioning." [App. A at 7-8]

a 57 on the Vineland Adaptive Behavior Scales (a widely accepted objective test of adaptive functioning) upon entering the Mentally Retarded Offender Program of the Texas Department of Criminal Justice at the age of 18. [App. A at 9] As the Texas Court of Criminal Appeals ("TCCA") noted, "even the State's expert witness at the [*Atkins*] hearing acknowledged that a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded." [App. A at 9] Though noting that Chester's evidence of significantly subaverage adaptive functioning was "persuasive," the TCCA nonetheless affirmed the trial court's finding to the contrary. The Texas courts' finding that Chester does not have significantly subaverage adaptive functioning was based exclusively on the seven "evidentiary factors" that the TCCA created in *Ex Parte Briseño*, 135 S.W.3d 1 (Texas Crim. App. 2004), to "define the level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* at 6. [App. A at 9; BIO at 17 & n.6]

By creating its own so-called "evidentiary factors" to assess mental retardation, Texas overrides and ignores the scientifically based clinical diagnostic definitions that inform the national consensus for determining who is mentally retarded. In so doing, Texas wrongfully deprives its mentally retarded citizens, including Chester, of the protections of *Atkins*.

REASONS FOR GRANTING THE WRIT

I. TEXAS'S METHOD FOR ASSESSING MENTAL RETARDATION RESULTS IN THE EXECUTION OF MENTALLY RETARDED DEFENDANTS, IN VIOLATION OF *ATKINS* AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. The Question Is Properly Presented For Review.

Respondent mistakenly argues that this petition is "premature." [BIO at 1] Respondent maintains that, because there is no constitutional right to state habeas corpus proceedings, "it follows that the denial of a state habeas application does not present a federal question for certiorari review." [BIO at 11] Final state court judgments deciding federal constitutional claims in state habeas corpus proceedings fall squarely within this Court's jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Roper v. Simmons*, 543 U.S. 551, 559-60 (2005); *Smith v. Texas*, 543 U.S. 37 (2004). In this case, the state's highest court rendered a final judgment on the merits of Chester's Eighth Amendment claim. That is all that is required.

Far from being premature, the question cannot be presented at any later stage of the case. On certiorari following federal habeas corpus, the question presented is likely to be not the consistency of *Briseño* with *Atkins* viewed independently, but whether, when viewed through the lens of 28 U.S.C. § 2254(d)(1), *Briseño* is an "unreasonable application" of *Atkins*. Consideration of the question presented here will provide a form of useful guidance to the lower courts - state and federal - that would not be provided by a decision of the section 2254(d) question. *See Medellin v. Dretke*, 544 U.S. 660, 664-65 (2005) (dismissing certiorari in federal habeas case for this and related reasons; anticipating that issues will be more appropriately presented

in a certiorari petition in a state habeas case); *Lawrence v. Florida*, 127 S. Ct. 1079, 1089 n.7 (2007) (Ginsburg, J., dissenting).

Respondent's citation to other courts that have noted or applied the *Briseño* factors presents a further compelling reason for certiorari to be granted. [BIO at 17-19] The issue is a recurring one. *Van Tran v. Tennessee*, which respondent cites, is the subject of a pending certiorari petition filed more recently than Chester's. 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006), *petition for cert. filed*, 2007 WL 2049304 (U.S. July 16, 2004) (No. 07-62). Unless certiorari is granted, lower courts will continue to decide this important constitutional question in a way that conflicts with *Atkins* and denies the protections granted by the Eighth Amendment. *See* Supreme Court Rule 10.

B. *Atkins* Recognizes A National Consensus On Mental Retardation.

This Court held in *Atkins* that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 536 U.S. at 321 (*quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Consistent with the approach in *Ford* regarding insanity, this Court did not set forth a precise standard for assessing mental retardation. *See* 536 U.S. at 317. But the national consensus that the mentally retarded are not among the most deserving of execution necessarily implies a national consensus about who the mentally retarded are. While allowing the states to develop "appropriate ways to enforce the constitutional restriction," this Court noted that the existing state statutory definitions of mental retardation "generally conform to the clinical definitions set forth" by the AAMR and the APA. *Id.* at 317 & n.22. These clinical definitions are accepted by those with expertise in the field and must establish the "minimum definition of mental

retardation sufficient to meet the national consensus." *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005).

Mental retardation is a medical condition, which is diagnosed by evaluating the cognitive functioning of the brain. Under *Atkins*, states could select any of the generally accepted definitions of mental retardation and still respect and adhere to the national consensus. A state, for example, if it preferred, could adopt the diagnostic criteria developed by the AAMR, rather than the similar - although slightly different - diagnostic criteria developed by the APA. Likewise, a state could adopt criteria that are more expansive than those promulgated by the professional bodies. *See, e.g., People v. Superior Court*, 155 P.3d 259, 266 (Cal. 2007). Adopting such a standard would ensure that individuals who test slightly above the standard cut-off point but who are, in fact, mentally retarded are not wrongfully executed.

But states are not free to undercut the criteria that define the national consensus. Texas, for example, could not set the IQ score for determining mental retardation at 65 or 60, rather than the widely accepted score of 70. Doing so would violate *Atkins* and ensure that individuals who are mentally retarded are wrongfully executed. Likewise, Texas may not adopt criteria for determining deficits in adaptive functioning that are less rigorous than those contained in the accepted diagnostic definitions of mental retardation. To do so breaks with the national consensus and inevitably results in sentencing mentally retarded citizens to death. That is exactly what Texas has done to Chester and to other defendants in Texas who have been sentenced to death, but who are mentally retarded under any nationally and medically recognized definition of mental retardation.

C. Under *Briseño*, Texas Dissents From The National Consensus And Systematically Executes Mentally Retarded Offenders.

Respondent admits that Texas assesses the adaptive functioning element of mental retardation exclusively by asking the seven, non-scientific *Briseño* questions developed by the TCCA. [BIO at 8] These questions inappropriately emphasize the facts of the crime and allow the trial court, as here, to ignore essentially undisputed evidence of mental retardation from qualified experts applying the accepted assessment criteria of the AAMR and APA. *See* Petition at 22-29. Reliance on the *Briseño* factors allows Texas to defeat a valid clinical diagnosis of mental retardation with evidence of the defendant's crimes. Indeed, through respondent's exhaustive recitation of Chester's crimes, Texas impliedly argues a proposition directly at odds with *Atkins*: that no one who commits such horrible crimes can be mentally retarded. [BIO at 3-7, 8-11]

Respondent's claim that the *Briseño* factors are derived from *Atkins* finds no support either in the opinion in *Atkins* or the opinion in *Briseño*. [BIO 16-17] The *Atkins* Court's description of "some characteristics of mental retardation [that] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards" in no way attempted to suggest criteria to be used for the clinical diagnosis of a severe disorder affecting brain functioning. *See* 536 U.S. at 318. To the extent that *Atkins* endorsed methods for assessing mental retardation, *Atkins* cited the clinical definitions of the AAMR and the APA. *See id.* at 317 n.22. In particular, the suggestion of the *Briseño* court that the *Atkins* consensus may be limited to a narrower group of individuals than those who receive public social and educational services on account of their retardation, 135 S.W.3d at 6-8, is contrary to the *Atkins* Court's explanation of

how and why the national consensus developed. *See* 536 U.S. at 317-21.

Briseño itself makes no pretense that its factors derive from *Atkins* or any other recognized and reputable source. The TCCA provided no explanation at all for how it derived these "evidentiary factors," apart from its rejection of expert testimony which it believed "will be found to offer opinions on both sides of the issue in most cases." 135 S.W.3d at 8. In *Briseño*, the TCCA inappropriately set out to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.* at 6 (emphasis added). There may be no such level of consensus in Texas, where prior to *Atkins* - as illustrated in this case - mental retardation was considered an aggravating factor, rendering a defendant more deserving of capital punishment. *See* Petition at 3 & n.2; *see also Ex Parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (Keller, P.J., concurring and dissenting) ("*Atkins* forces us to intrude upon the will of the people of Texas, as expressed by our legislature, and upon the will of the jury.") Moreover, contrary to the assumption expressly embedded in *Briseño*, it is not the "consensus of Texas citizens" whose view of mental retardation is constitutionally determinative of who lives and who dies as punishment for a crime. Rather, under *Atkins* and the Eighth Amendment, it is the national consensus. 536 U.S. at 316.

Neither the *Briseño* court nor respondent made any effort to relate the *Briseño* factors to any valid definition of mental retardation. In dismissing relevant expert testimony and accepted objective measures of intellectual functioning in favor of *Briseño*'s questions, Texas continues to execute offenders who are mentally retarded under the established clinical definitions accepted by the national consensus recognized in *Atkins*, in violation of defendants' rights under the Eighth Amendment.

Briseño's failure to credit relevant expert testimony is particularly troubling. 135 S.W.3d at 8-9. [BIO at 16] Mental retardation is a medical condition that impairs the functioning of the brain. It cannot be diagnosed by a lay fact-finder. Application of the accepted clinical definitions requires the specialized skill and training of medical professionals. Resolving conflicting expert opinions is a common and essential element of an adversarial system of justice. Such conflicts are properly resolved by the finder of fact assessing which opinion is more persuasive - not by disregarding all expert testimony and relying, instead, on a test of mental retardation created by judges out of whole cloth, un-tethered to any professionally accepted diagnostic criteria.

The flaws in the application of the *Briseño* test for significantly subaverage adaptive functioning are particularly evident in Chester's case. At trial, there was no real dispute between experts that Chester is mentally retarded as defined by the recognized definitions adopted by the AAMR and the APA. Texas's expert testified only that, in his view, Chester is not mentally retarded when evaluated solely on the *Briseño* factors. Significantly, Chester's deficits in adaptive functioning - the only element of the diagnosis of mental retardation challenged by respondent - were established by a combination of lay testimony, expert testimony, and the objective test of the Vineland Adaptive Behavior Scales. Even respondent's expert agreed that the Vineland score is a valid measure of adaptive functioning. [App. A at 9] The Texas Department of Criminal Justice itself had twice previously classified Chester to its Mentally Retarded Offenders Program. [Petition at 2-3; App. A at 9] Yet, constrained to the *Briseño* factors, the trial court and the TCCA found that Chester is not mentally retarded, ignoring all clinical evidence to the contrary.

Recently, in *Panetti v. Quarterman*, 127 S. Ct. 2842, 2860 (2007), this Court held that the test applied by the Fifth

Circuit Court of Appeals to assess a Texas prisoner's competency to be executed was based on a flawed interpretation of *Ford*. The Court of Appeals' three-factor inquiry for determining whether a prisoner is aware of the reason for his execution treated a prisoner's delusional belief system as irrelevant and disregarded clinical evidence of the prisoner's psychological dysfunction. *Id.* at 2861-62. This Court held that "[t]o refuse to consider evidence of this nature is to mistake *Ford*'s holding and its logic." *Id.* at 2862. Although *Ford* did not set forth a precise standard for competency, this Court in *Panetti* found the Court of Appeals' standard "too restrictive to afford a prisoner the protections granted by the Eighth Amendment." *Id.* at 2860.

Texas's seven-factor inquiry for determining adaptive functioning is similarly too restrictive to afford a prisoner the protections of the Eighth Amendment. The *Briseño* factors do not lead to a valid assessment of adaptive functioning. While *Atkins* allowed the states to develop appropriate ways to enforce the constitutional restrictions of the Eighth Amendment, *Panetti* counsels that the Eighth Amendment also restricts states' ability to stray from the accepted definitions of mental retardation or to establish procedures that allow the fact-finder to ignore relevant evidence of mental retardation. *Id.* at 2859-62. States may not create standards that deprive mentally retarded defendants of an exemption guaranteed by the Eighth Amendment; attempts to do so must be invalidated as "too restrictive." *Id.* at 2860. As in *Panetti*, this Court should grant certiorari to enforce the protections of the Eighth Amendment that are being thwarted by Texas's application of an invalid test for mental retardation.

CONCLUSION

The Court should grant certiorari to ensure Texas's compliance with *Atkins v. Virginia* and enforce the Eighth Amendment's prohibition against executing the mentally retarded.

Respectfully submitted,
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